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THE PRESIDENT, THE CABINET, AND INDEPENDENT AGENCIES

AKHIL REED AMAR*

The essay is a slight revision of a presentation delivered by Akhil Reed Amar at the Presidential Powers: Prudence or Perversion? symposium on October 7, 2010, sponsored by the University of Saint Thomas Journal of Law and Public Policy.

Of all the textual uncertainties confronting America's first president, none loom larger than the indeterminacy shrouding his own role in the new constitutional order. The text made some things clear: America's chief executive would serve a four-year renewable term; would wield a federal veto pen and a federal pardon pen; would personally oversee high executive officers whom he would hand-pick, with senatorial support; would make treaties, again with senatorial involvement; could win reelection independently of Congress; and could be ousted from office only if a House majority and a Senate super majority found him guilty of gross misconduct.

In all these respects, America's president would tower far above a typical state governor, yet remain far below England's King George III. But exactly how far above and how far below should Washington position himself on various executive power issues as to which the constitutional text was silent or opaque? For starters, could he lay claim to any general executive powers or executive privileges beyond the presidential responsibilities that were specifically listed in the constitutional text? Now, the executive article, Article II, opened with the following words: "The executive powers shall be vested in the President of the United States of America."¹ This sentence appeared to confer on the president a general residuum of executive power above and beyond very specific presidential powers and duties itemized a few paragraphs later. Yet ordinary Americans, during the ratification period, could be forgiven for missing this point. Article I confined Congress to an enumerated list of specified powers and Article III, likewise, limited the jurisdiction of federal courts to a textually

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1. U.S. CONST. art. II, § 1, cl. 1.

enumerated list. While Article II used subtly different language that suggested that the list of specific presidential powers was exemplary, rather than exhaustive, it took an eagle eye to spot the textual difference, and few Americans during the ratification period paid attention to the powerful possibilities coiled within Article II's opening clause. Eager to persuade anxious anti-federalists that the Constitution did not swing toward monarchy, leading federalists directed the public's gaze to the limited nature of the specially enumerated presidential responsibilities.

Faithful constitutionalists, seeking to honor the text as originally understood, are thus yanked hard in opposite directions. On the one hand, most ratifiers may not have realized that the president would enjoy a residual executive power. On the other hand, the people had said yes to a text that seemed to say just that, and surely the public did understand that the Constitution would summon up a far more muscular executive than anything they had experienced in 1776.

A seeming tension between the text and the public understanding in 1787 should prompt us to take a closer look at both, in the hope that we might find some means of reconciliation. Why didn't the text delimit the scope of presidential power with more clarity and exactitude and why didn't the ratifying conventionists obsess more over every facet of Article II? At least three factors converged to blunt the textual edges of the executive article and to blur the precision of the accompanying ratification conversation.

First, no ancient or modern legal model closely prefigured the contours of the federal chief executive that the founders were attempting to conjure up. British monarchs had ruled by dint of noble birth and claims of divine rights. Most colonial governors had answered to kings, most post-independent state governors seemed far too weak. The presiding officer of the federation congress was, likewise, a mere shadow of the new president Americans were trying to invent. Though Americans could agree that their new president needed to have a very different package of powers than any previous executive, there remained understandable uncertainty about exactly what package would be best.

Second, the very nature of presidential power made it hard in 1787 and continues to make it hard today to fully specify the precise boundaries of that power in all contingencies. In a nutshell, Congress passes laws, authorizes expenditures, polices its own membership and oversees the other branches' investigations and impeachment, while federal courts decide cases under law and monitor subordinates within the judicial branch. By contrast, presidents perform a wider range of qualitatively different tasks; they promulgate interstitial rules, much like legislators, they find facts, construe laws and apply laws to facts in the first instance, much like judges, but they also do much, much more.

For example, they officially propound new legislation and define a reform agenda; they participate in the passage of federal statutes; they pick federal judges; they direct and communicate and coordinate action with state governments; they stand atop a vast bureaucratic pyramid, filling and sometimes thinning the ranks of federal executive officialdom; they collect revenues and disburse funds; they manage federal properties; they file and defend lawsuits on behalf of the nation; they prevent, investigate and prosecute civil and criminal misconduct; they ponder mercy for miscreants; they command armed forces in both war and peace; they respond to large-scale disasters and crises; and they direct diplomacy and international espionage and they personify America internationally. Even today, sophisticated commentators often define executive power not affirmatively, but residually. On this view executive power encompasses all proper governmental authority that's neither legislative nor judicial in nature. Legislatures and judiciaries almost always act with standard operating procedures, but presidents recurrently need to improvise to handle fast-breaking situations that threaten to up-end the entire system, such as the Civil War, or which present unique opportunities to promote the national welfare, like the Louisiana Purchase. The very nature of the presidential office defies easy textual specification, even after two centuries of post-founding experience. My first argument was, they didn't have a clear model for the presidency, and the second is, it's actually hard to specify everything that presidents properly do.

Third, even had precise textualization of every aspect of presidential power been theoretically possible, hyper-textualization would nevertheless have been awkward because Americans in 1787 were not designing the office in the abstract. This is a point I think that both John Yoo and I very much agree on. There are some disagreements, but this is a point of strong commonality.

The framers were tailoring the office for its first intended occupant, George Washington. Without Washington at the helm as America's first president, it was widely believed that even a perfectly designed constitutional-ship state might flounder at the launch. Conversely, with Washington in charge at the outset, even an imperfect text might work, so long as the text fit the first man suitably well. An overtextualized executive article might not match Washington's precise proportions, thus Americans undertextualized presidency because they trusted Washington to make sensible adjustments after wearing his custom-made constitutional uniform and testing it against the elements.

The textual openness of Article II, the give in the garment of the executive power, was not a design flaw but a desired feature. Now, it's true that nothing in the official constitutional text required that George Washington be America's first president, but without its near universal

understanding that Washington would guide the new ship of state at the start, the executive article, Article II, would have been drafted in dramatically different fashion and perhaps nothing closely resembling the Philadelphia plan would have ever won the express approval of the American people. And one little fun fact is the attestation clause of the Constitution, where they all signed their names, begins with the suggestive signature of the Philadelphia convention's presiding officer, and it reads as follows: Go. Washington, President.

It is true that nothing in the official constitutionalist text explicitly delegated authority to George Washington to fill in the blanks and thereby sharpen the role of all future presidents; but on the other hand, the terse text doesn't explicitly prohibit this interpretive inference that the framers and ratifiers were in effect deputizing Washington to clarify the executive article, subject to the broad advice and consent of the other branches and the American people. Though the constitutional text does not compel this delegation to Washington interpretation, the text permits and even invites this reading for the simple reason that this reading makes sense. It explains the otherwise puzzling and even dangerous looseness of Article II and turns what otherwise might seem a failure of draftsmanship and deliberation into something rather safe and clever. So from this perspective we're now poised to see how the written and the unwritten Constitution fit together; in this case the unwritten Constitution is defined by post-ratification precedence set by Washington himself.

Several of the basic features of America's enduring presidential system were established less by constitutional text, than by the gloss on the text provided by Washington's actions, actions that he initially undertook with scrupulous constitutional conscientiousness and that ultimately won acceptance from the other branches and the American people. I'll just run through a few of them. And, here again, on many of these I think I'm actually rather in sync with John Yoo's very thoughtful paper. There are going to be some differences, as you'll hear.

First, America's presidents today enjoy unilateral power to officially recognize and de-recognize foreign governments. In 1979, for example, without any specific pre-authorization from Congress as a whole or from the Senate, President Jimmy Carter established normal diplomatic relations with the Communist People's Republic of China, formally recognizing that regime as the official sovereign power in China. In the process, Carter cut formal diplomatic ties with the anti-Communist Taiwanese government, which had previously been recognized by the U.S. government as the lawful Chinese regime, and indeed an official America treaty partner. The text of Article II lists specific presidential responsibilities and this text can be plausibly stretched to cover the recognition/de-recognition power of the president. In particular, the list declares that the president, "shall receive

ambassadors and other public ministers,”² so you can stretch the text to reach that.

The text can also be read far more modestly as simply providing that foreign diplomats from regimes already recognized by the President and Congress, or alternately lead by the President and the Senate, should as a matter of official etiquette and protocol and ceremony just present their credentials to the President when they arrive on American soil. If you read what Hamilton says in the Federalist Number 67, he actually describes this recognition clause as a mere matter of etiquette and convenience, more about dignity than authority, a role of miniscule consequence whose main effect would be to avoid the need to summon the legislature and the Senate into special session whenever one diplomat replaces another from a previously-recognized foreign regime. So if you just look at how the text is being presented by the federalists, it could read very narrowly; on the other hand, you could read the text more broadly, there are textual possibilities, there’s structural possibilities, but for me but the strongest legal argument isn’t anything just about the text as understood in the ratification process, or even structural inferences, because you could argue those either way.

The strongest argument is a powerful precedent set by a powerful president named Washington. And here’s the precedent: When the French revolutionaries grabbed power and guillotined King Louis, XVI, on Washington’s watch, a momentous American decision had to be made: Americans could opt to stand by the French monarchy, which had bankrolled the American revolution and signed treaties of alliance with the United States in 1778—that’s option one. Alternatively, America could choose to recognize the French revolutionaries as the rightful government of France, entitled to all the treaty rights of prior regimes—that’s option two.

Or perhaps—this is option three—America could stand aloof from all French factions in the bloody maelstrom and declare that old treaties were now entirely void because the original partner, Louis, no longer held power and because the revolutionary upstarts had no automatic entitlement to the treaty concessions that Americans have granted only to Louis and Louis’s designated successors, starting with his son, the dauphin. The competing considerations, loyalty to a family monarchy, solidarity with fellow democratic revolutionaries, and anxiety about being sucked into an increasingly violent vortex tugged in different directions.

A wrong decision on America’s part could have had dreadful consequences. Were the U.S. to back the losing contestants in an unfolding and unpredictable tumult, the ultimate winners might well seek vengeance against the propitious Americans.

2. U.S. CONST. art. II, § 3.

Here's the key point: After consulting his cabinet, George Washington made the fateful decision himself, in effect transferring America's official recognition from the fallen French monarchy to the reigning French revolutionaries. Far more than any word or phrase in the written text ratified in 1787–88 this post-1789 precedent established the basic ground rules for all subsequent presidents. For example, Jimmy Carter, in 1979, trying to decide whether and how America should cut diplomatic links with displaced sovereigns and create diplomatic ties to new regimes.

That's the real precedent that establishes Jimmy Carter and other presidents' entitlements to recognize and de-recognize foreign regimes, less the text than that precedent, an unwritten constitution. The second basic feature of presidential power, cemented by Washington, considers the president's unilateral power to communicate, even secretly, with foreign regimes and negotiate treaties without the Senate's foreknowledge. President Carter's formal recognition of the People's Republic of China followed on President Nixon's famous visit to mainland China in 1972, which in turn built on diplomatic foundations laid in 1971 when Nixon secretly sent his envoy, Henry Kissinger, to Beijing to parlay with the Chinese communists. Here, too, we could devote various plausible textual and structural arguments to support presidential power and, here too, their plausible textual counter-arguments.

The matter's been settled beyond all doubt, less by the naked constitutional text than by actual practice of presidents of all parties with repeated backing of senates and congresses when presidents have sought formal legal support for previously secret diplomatic initiatives.

Perhaps the most famous and consequential episode occurred when President Jefferson quickly negotiated for the purchase of the Louisiana Territory as soon as this vast tract of land was unexpectedly plopped onto the bargaining table in Paris in the late spring of 1803. Had Jefferson sought to delay negotiations in order to get detailed advice and pre-approval from the Senate or House, neither of which was then in session, he might have run the risk that the mercurial Napoleon might change his mind and whisk the land off the table. Instead Jefferson, via his hand-picked diplomat, James Monroe, seized the day and closed the deal. When Congress convened in the fall, Jefferson won the support of both two-thirds of the Senate, which ratified the treaty he had negotiated on his own initiative, and the majority of the House, which later voted, along with the Senate, to provide the legal structure for the new lands and to foot the bill.

This doubling of the new nation's land mass, one of the most spectacular diplomatic triumphs in modern world history, followed an established script. But the script was established less by the debatable text of the written Constitution, than by the definitive gloss on that text that Washington had added in the early 1790s.

The diplomatic initiatives culminating in the famous Jay Treaty, seeking to expand trade with England and induce the relinquishment of key frontier fortifications that the British had yet to hand over, as previously promised, Washington first secretly sent an unofficial emissary, Governor Morris, a proto of Henry Kissinger, to Britain and then followed up with formal diplomatic overtures. Although the Senate confirmed Washington's choice of envoy extraordinaire, John Jay, senators did not preapprove the specifics of Jay's official diplomatic mission. Instead, Jay followed Washington's negotiating instructions in the months after—Jay and his English counterpart—to reach a definitive deal in November 1794, which was the treaty brought back before American lawmakers.

Eventually, both the Senate and the Congress as a whole endorsed Washington's diplomatic entrepreneurialism. The Senate ratified the treaty in June and Congress enacted the necessary implementing legislation and appropriations.

A third and related piece of executive power also settled squarely into place as a result of Washington's conduct in the Jay Treaty. After winning Senate approval for the treaty, Washington reserved the final legal move for himself. In the end he alone decided whether to officially ratify the treaty in the name of the nation. Only after he decided to proceed in the wake of the Senate's "yes" vote, did the treaty become legally binding. He also needed to secure some British agreement to some modifications that the Senate had insisted upon as a condition of giving its advice and consent.

While the Constitution's text could be parsed different ways on this very nice question of treaty-making raised by the power sharing between presidents and Senate, what's constitutionally decisive today is not the pure text, but rather the institution of laws first applied by Washington and accepted then and ever since by his countrymen.

A fourth aspect of executive power involved the neutrality proclamation, which confirms the president's role as the sole organ of communication, the person who articulates publicly American foreign policy to the nation and to the world.

Now, one aspect of the neutrality proclamation is worth noting now because this aspect has failed the test of time. Washington, in his neutrality proclamation, suggested that any American who violated the neutrality idea would be subject to federal prosecution, just because of the Washington say-so. But the Supreme Court later made clear in an 1812 case, *United States versus Hudson and Goodwin*, a classic fed courts case, that American presidents lack authority to create federal criminal law unilaterally, as do federal judges.³

There's no federal common law of crimes. This ruling accurately

3. *U.S. v. Hudson*, 11 U.S. 32 (1812).

reflected the Constitution's grand architecture, which guarantees that ordinarily no person can be convicted of a federal crime unless Congress first defines the crime and determines the accompanying punishment with specificity and prospectivity. Textually the legislative article, Article I, explicitly authorizes Congress—not the President, not the judiciary—to “define and punish offenses against the law of nations.”⁴ In fact, Congress did just that in its Neutrality Act of 1794, which provided the proper legal authorization for the prosecution policy that Washington had prematurely proclaimed.

Thus, the justices got it just right, when they insisted in 1812, that “the legislative authority and union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense.”⁵ In this landmark martial court ruling we see the proper limits of America's unwritten Constitution. Where the text and structure of the written document are clear, the written Constitution trumps the unwritten Constitution even where George Washington is concerned.

Those are the Washington precedents. Now, my next little section is about the heads of the departments, what we call the cabinet. In all the Washington administration episodes just canvassed, the President relied heavily on the advice of an inner circle of top executive branch officials and this advice is to take a hard look at the President's cabinet, which is a word that nowhere appears in the text of the written Constitution as ratified, but is an entity that's played an important role in America's actual institutional system from 1789 to the present.

So here are the key things you need to know about the cabinet: Cabinet members are the President's men and have been ever since the days of Washington. America's first president leaned on his cabinet because he had hand-picked this team, according to the Constitution's explicit appointment rules, and because these powerful lieutenants answered directly to him under the Article II opinions clause, which encouraged presidents to require reports from the principal officers, elsewhere described as the head of each executive department.

Also key was the fact that these men served at Washington's pleasure. He had the unilateral power to dismiss them at any time, for any reason, and he was willing to wield this power. In 1795, within days of receiving intelligence, raising grave doubts about the fitness of his second Secretary of State, Edmund Randolph, whom he had appointed to replace Jefferson, Washington muscled Randolph out of office.

Where does the Constitution give presidents this unilateral, plenary, and instantaneous authority to fire heads of executive departments? Article II

4. U.S. CONST. art. I, § 8, cl. 10.

5. Hudson, 11 U.S. at 34.

explicitly makes the Senate [inaudible] ordering the hiring of department heads, arguably the Constitution's text implicitly gives the Senate a symmetric role in the firing of department heads. A reading would generally require presidents to win senatorial consent before firing any cabinet member and, indeed, that's the interpretation that Hamilton puts forth in *Federalist* No. 77.

As soon as Washington took the helm, his supporters, in and out of the first Congress, including Hamilton, who changes his mind on second thought, insists that the Constitution gave the President a unilateral right to fire any executive head in whom the chief executive had lost confidence. After extensive deliberation, the first Congress adopted a series of statutes designed to acknowledge this presidential claim of right. More than anything in the terse text or popular understandings that emerged during the ratification process, it was the first Congress's famous decision of 1789 that established the bedrock rules of executive branch firing that govern actual 21st century practice.

Now, I understand the hard-core textualists can insist, as did some of Washington's supporters, that the President's plenary authority to dismiss executive branch underlings is simply one aspect of the present executive power vested by Article II's opening sentence. Here's the problem with that understanding: If this sentence alone gave the president the power to fire cabinet officers at-will, logic would suggest that the opening sentence, likewise, gives the president power to fire at-will all other high-level executive branch appointees; that is all top appointed federal officers, except judges and judicial branch officers. This broader power, however, has not been recognized as an actual American practice over the centuries, and a wide range of high-profile and well-settled area statutes have long limited and continue to limit the president's ability to unilaterally remove nonjudicial officers.

For example, when Barack Obama succeeded George W. Bush in 2009, everyone understood that Bush's treasury secretary, Henry Paulson, would need to leave immediately if the new president wanted to give the job to someone else; and, in fact, Obama let Paulson go. Yet, virtually no one, or at least no one maybe outside the academy, virtually no one thought that Obama could likewise immediately dismiss all of the governors of the Federal Reserve Board, simply because he may have preferred new persons of his own choosing. On the contrary, the statute authorizing the Federal Reserve Board, a statute with basic framework that's been in place for three-quarters of a century, pointedly limits the ability of a new president to sweep the fed clean on day one; thus, the fed and the treasury are governed by different firing rules. The simple text of Article II executive power clause cannot easily explain this interesting difference in actual institutional practice.

The best explanation is that in 1789 Congress squarely acknowledged presidential authority to remove certain kinds of executive appointees at-will, but made no similar ruling regarding other appointees. The decision in 1789 has in effect glossed the language of Article II of the poll and established that individual department heads must be subject to unilateral removal, whenever the president loses confidence in them, for any personal or political reason. Federal Reserve Board governors differ from Treasury Secretary Paulson because the system established on Washington's watch cemented Washington's plenary removal power over treasury secretary Alexander Hamilton, who was Paulson's founding-era counterpart, and over all other individual department heads, but in 1789 Congress did not cement in place identical removal rules for all other executive appointees.

As a result, later congresses were free to enact somewhat different mechanisms of accountability for these other appointees, even important executive branch appointees such as governors of the Fed. There are at least two ways to conceptualize the status of the Fed in light of the decision of 1789. One view is that, governors of the Federal Reserve Board are simply not department heads, strictly speaking. Unlike the statutory structure establishing regular cabinet departments, topped by a one-man decisional head or principal officer, the statute created the Fed to have legal authority in a multi-member body, thus the Fed and certain other nonjudicial agencies whose top officials are not removable by the president, may indeed be seen as headless in a certain sense.

The point is not that these headless agencies live in some mysterious fourth branch of government, beyond all presidential supervision and control, after all, even vis-à-vis these agencies. The president remains the ultimate head of the executive branch and retains broad powers of appointment and certain additional executive powers of oversight and for-cause removable, as distinct from at-will removal. These agencies may be viewed as headless in a much narrower and more technical sense that power of these agencies resides not in a one-man head principal officer, but instead in a multi-member commission.

Okay, so that's one way of understanding the status of the Fed; here's a different way, an alternative interpretation of Article II as lost by the decision of 1789 is also available, and this is the one I think is most consistent with the most recent case law, the PCABO case, the PCABO case just decided a few months ago.⁶

Here's the alternative interpretation that's available. I'll try to explain the basic constitutional difference between the Fed and the treasury in a different way. Perhaps we should think of the Fed not as a headless

6. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (June 28, 2010).

department, but as a hydra-headed department. On this view hydras can qualify as department heads and they can be vested with various powers, but the rules of removal are different for hydras than for individual department heads. Why, because post-1789 presidents and congresses have in effect decided that the president only needs to enjoy the power to remove hydra heads for cause, rather than at-will.

In sharp contrast to the broad operational freedom typically enjoyed by the chief official in the single-headed department, like the treasury, each member of a hydra-head commission is routinely subject to close monitoring by each other member for possible misconduct, and any commissioner who has concerns about a peer is well positioned to confirm with other commissioners and to report these concerns immediately to the president. As a result the president doesn't need to have the preemptory power to remove at-will, nor to assure commission members due subordination and energetic performance. Removability for cause, supplemented by the additional horizontal monitoring provided by a multi-member commission and structure, may well suffice if Congress and the President prefer this alternative accountability structure and embed this accountability structure into the department's enabling statute.

Now, at the end of my talk I'm going to come back and give you a few more thoughts on independent agencies, so I'm going to come back to that point in just a few minutes. But even if the decision of 1789 does not require at-will removability of the hydra-headed department heads like the Fed, the decision of 1789 does firmly establish that neither Congress as a whole nor the Senate nor any subset of these bodies can properly participate in any specific removal decision outside impeachment. Whatever removal power exists, whether at-will or for cause, is ultimately executive power, not legislative or senatorial power, and thus properly resides solely within the executive branch. This much, at least, was settled for good in 1789, even if other elements of the 1789 settlement may plausibly be read in different ways. Thus, the opening executive power language of Article II was not only clarified and qualified by the textual list of specified presidential powers that appeared later in Article II, but was additionally glossed, clarified, and qualified by the basic settlement achieved between the first Congress and President Washington. And Madison predicted as much; this is what he said to the first Congress: "The decision that is at this time made will become the permanent exposition of the Constitution."⁷

Okay, I'm going to skip some other stuff because—and I do want to say a little more about independent agencies and I very much want to get into a conversation with you all. I have another section of this paper where I talk about how in 1787 most people probably expected that the Senate would

7. James Madison, Speech in Congress on Presidential Removal Power (June 16, 1789).

emerge as the president's sounding board, and that's not what happened, it actually turns out to be a thing called the cabinet, and how did that emerge, and I identify a few features. One thing that is very important to understand that I emphasize is that cabinet officers answer to the President, not vice versa. He can choose to consult them, but the buck stops with him. And one very important idea of the Constitution is that there wasn't going to be just a secret executive council that took votes and the president would say, look, I wanted to do this, but I was overruled by my council, so that was explicitly repudiated by the Constitution, the federalist papers explicitly repudiate that model, and the opinions clause is in fact designed to ensure that these individual department heads will answer to the president and won't ever be able to formally—to outvote him in a secret vote, so—and to the extent that the president actually ever consults the cabinet as a group, it's in a little tension with the idea of the text which seems to suggest more of a hub-and-spoke model where the president asks each officer, but doesn't sort of consult them as a group, but I say, well, why does the group concept emerge, and I identify about four reasons: One, because various issues involve more than one department, you know, are you going to set up a national bank, well, that involves a legal issue, it involves foreign affairs like should aliens be able to be stockholders in this bank, so one reason is that things spill over across the departments, the real world issues.

A second reason is that the Attorney General, by statute, actually answered to each of the department heads and to the president and so informally he kind of tied them all together and so it sort of made sense to sort of confer with everyone because the AG is conferring with each department head and the president.

A third reason is that Washington is a consultative sort. He had been served well by councils of war in the revolutionary war experience, and so he's often looking for advice. He'll make his own decision, but he's not afraid to broadly consult. And there was, of course, English practice of privy council, state practice of state executive councils and so the federal constitution emerges with something that some resembles other things, but with a very strong still unitary executive making his own decisions. And the rawness of the cabinet, to some extent, occurs at the expense of the Senate.

People who are voting for the Constitution might well expect that the Senate would emerge as the consultative body. Why doesn't that happen? Here's why they might have expected it: Because in most of the states the upper house—most of the colonies and then many of the states, the upper house of the legislature doubles as an executive council and twice the Constitution's text refers to the Senate using words "advice" and "consent," so you might have thought that that's what's going to emerge. It doesn't. So why not? Upon reflection, there are some structural mismatches.

Washington actually at first tried to consult the Senate. I have a couple

of quotes. Washington goes to the Senate to ask for their advice on something and the senators are afraid to say yes too quickly. Here's what one senator writes in his diary; you know, he's worried that if the Senate says yes to the President too quickly, it's almost like a woman on a date or something, just the way he writes it, her first date or something, you know, should she kiss him on the first date. She says, we should have these advices and consents ravished in a degree from us, you know. I saw no chance for a fair investigation of subjects while the President of the United States sat there to support his opinions and overall the timid and neutral part of the Senate, so we're not going to, you know, say yes to him too quickly on the first date because otherwise he won't respect us in the morning or something.

Then Washington has to leave and as he leaves, you know, he actually is very frustrated, he says, "this defeats every purpose of my coming here." He sort of loses his temper momentarily, then he regains his composure because Washington is the master of his emotions. He comes back the next—a couple days later, sits through a very tedious Senate conversation, they finally agree to what he wants to do, and as he walks out, here's actually the third-hand account, one person hears him saying, "He would be damned if he ever went there again," and basically he never goes there again to get official advice and consent. But if that's the only reason that they're afraid of Washington or something, there should have been emerging sort of a practice of written consultation in advance back and forth before the president does things that doesn't emerge.

Why not? Several things. Why does he basically start conferring with the cabinet rather than the Senate. One, the Senate is too big to be really a secret body. These earlier executive councils were composed of twelve people, the Senate begins at twenty four, it ends at thirty two, it's going to get much bigger. Two, [the Senate] can't keep a secret. Three, [the Senate] is answerable to state legislatures and ultimately not to him, whereas cabinet officers answer to him and if they leave—now, all of this is made possible by the decision of 1789, you see, because if the Senate has to be involved in every cabinet firing, well then the cabinet officers are going to suck up to the Senate to some important extent and needs to stay in its good graces. And by the way, the senators also want to leave town, they have to go back home and tell the folks back home what they've done. The cabinet is going to stay there and do their job; but if the decision of 1789 had been decided differently, then the cabinet officers might be tempted to accompany senators back home and to lobby state legislatures to stay in their good graces.

So the decision of 1789 enables everyone to specialize appropriately; the Senate can go back home every so often and explain what they're doing, the Cabinet can stay in place and advise Washington year-round and keep

an eye on him. Senatorially-approved people can keep an eye on the President. The Senate can feel responsible in leaving town because they know that someone's there watching the President in case there is something mischievous going on, and at the end of the day the President himself can be responsible for all executive conduct.

Let me finally just come back to independent agencies and in about ten minutes tell you how I think about independent agencies, because I think here is where I probably might disagree the most with some of the folks on the panel. Because I reckon myself a unitary executive person, but we come in many flavors and sizes. What are we talking about here, independent agencies created over the last century, such as the Federal Trade Commission, the National Labor Relations Board, the Federal Reserve Board, and the Consumer Products Safety Commission.

In what sense are these agencies independent? You know, well, some people say, oh, they're independent because they do a lot of functions, they promulgate rules of conduct like the legislature, they enforce criminal statutes like an executive branch, they sort of perform quasi adjudicatory tasks of deciding things even between private parties like a court. That alone doesn't make them independent, that's what executive power is, as I said before. So this mixture of functions itself, it doesn't mean that they're somehow not executive. They do not float freely between the Congress and the President, nor is it the case that Congress can kind of put them anywhere it wants on the continuum.

Here are the rules: First, they're appointed by the President, not by Congress, not by any subpart of Congress, okay? Congress has tried in the past to appoint these folks and the Supreme Court said, no, you can't do that, that's, for example, the *Buckley versus Valeo* case, so the rules of appointment are very clear, these are appointed by presidents, not by congresses.⁸ How are they removed, they're not removed by Congress as a whole, they're not removed by the Senate, the Senate plays no role in their removal, nor does Congress as a whole or any subpart committee, they're removed unilaterally by the President and only the President. So they're executive agencies, whatever power to remove them is executive power.

Now, it is true that they're not removable at-will, they're removable for cause, and that's the key difference between them. Now, why is this difference between the Fed and the Treasury again sort of possible? True, we could read the Constitution. Essentially, we could read the vesting clause to imply that all top executive officials must be removable at-will. We could further read the Constitution to imply that whenever a statute creates any executive branch discretion or decisional authority, the President may always substitute his own personal discretion or decision for

8. *Buckley v. Valeo*, 424 U.S. 1 (1976).

that of any high-level executive official, even when the statute explicitly vets the discretion or decisional authority in the official and not the President, but this is hardly a required reading of the text, which after all qualifies as initial branch of executive power to the President in a variety of ways.

A later clause of Article II says the President, “Shall take care that the laws be faithfully executed.”⁹ The clause doesn’t say that the President shall personally execute all the laws, it says he shall oversee others and take care that the laws be faithfully executed by others who may indeed be vested by statute of certain discretion or decisional authority in domains where these independent officials possess distinctive expertise or impartiality, or so the Constitution can plausibly be read, and here’s my key point, and so actual practice has in fact operated for decades and perhaps centuries and this reading enables the Constitution’s text and actual practice to cohere.

Now, you can’t remove them at-will, but what powers does he have over these independent agencies? He can dismiss any independent, quote-unquote, official who’s not faithfully executing the law, anyone who’s corrupt or negligent or lawless, he can also dismiss them if they’re insubordinate to his proper rule as superintendent of the executive branch and the wielder of a broad set of powers that the Constitution does vest in him personally. For example, he personally has the pardon power, and so if some independent prosecutor wants to go after someone and he tells the independent prosecutor, no, I don’t want you to go after this person, I would think that the independent prosecutor would have to listen to him because he has the greater power of pardon and, therefore, the lesser power of non-prosecution. If the so-called, quote-unquote, independent prosecutor doesn’t listen to him, he’s being insubordinate and that’s grounds for removal because the Constitution itself gives the President and the President alone power to pardon and not prosecute. So this casual label of independent agency shouldn’t blind us to the key point that these officials, quote-unquote, independent, falls wholly within the executive branch, albeit with varied rules of composition authority and removal.

Here’s my key way of cabining this, and I close in one minute, the history of practice, viewed through the prism of constitutional text and structure suggests that in three particular contexts the independent agency model may have special appeal. First, when an executive department is vested up by a committee rather than a single officer. Second, when there exists a strong need to create a fixed tenure office embodying technical expertise or nonpartisanship. And third, when an executive department—all three of these typically need to be in place, when an executive department operates in the manner that does not tightly intertwine with specific grants

9. U.S. CONST. art. II, § 3.

of personal presidential authority, such as the power to pardon criminals, to pardon the foreign leaders, to supervise cabinet officers and so on.

While the powers vested in independent agencies and limited removability of these agency officials do constrain presidents, here's my final point, virtually all modern presidents have accepted these constraints, in sharp contrast to many presidents who have loudly objected to improvisations, such as the legislative veto or the statutory independent council under the so-called Ethics in Government Act of 1978.

Those improvisations, independent councils under the 1978 act and the legislative vetoes weakened presidents vis-à-vis Congress and courts. By contrast, limitations on the removal of independent agency officials have merely reshuffled power among presidents; also a president may not remove at-will all the officials he inherits on his first day in office, neither may his successor remove at-will all the officials he manages to appoint between his first and last day on the job. Each president gets a fair share of presidential power, albeit with a time lag. Put differently, independent agencies do not involve any legislative vetoes in removals, they don't give judges nonjudicial power to appoint executive officials.

Unlike legislative vetoes for the independent council statute that's now lapsed, laws establishing independent agencies do not vest members of other departments with any executive power whatsoever; rather these laws merely allocate authority within the executive branch between the president and his subordinates. Many presidents over the years may not have even wanted truly plenary power to remove and/or countermand all executive officials. The responsibility to review on a clean slate every policy decision made by every underling might well have weakened modern presidents by overloading them, making it harder for them to concentrate on the issues that matter most, especially in areas where the Constitution or statute vested them with personal decisional authority.

In this respect, modern presidents confront a qualitatively different problem of supervision than the challenge faced by George Washington, who stood atop a federal bureaucracy of infinitesimal size by modern standards. In the end the simple fact that modern presidents themselves have embraced independent agencies furnishes a strong reason for the rest of us, likewise, to make room for these agencies as we ponder the terse text of Article II.

MR. TONY NAGORSKI: Well, thank you, Professor Amar, for your comments, and I'd like to open it up now to our panelists and audience members for any questions that they may have. Panel members? Go ahead.

PROFESSOR JOHN YOO: The question I have about Washington is I don't disagree with your point of view on the things he did, but the question I have is, why did they last? So like Washington at the beginning of the Constitution is the father of the country and the general who won the

revolution. By the time he leaves office he's a very conservative partisan figure. You have a political party founded by Jefferson that arises to oppose his policies, so why isn't it the case that by the time—when Jefferson takes office in 1800 they just don't, you know, wipe away all of these Washington precedents and instead, as you point out, the law of Washington did survive until today, but it's not—you know, it's not obvious that they should have and why didn't normal politics put into practice something else or why do we have a tradition now where each political party, when they take office and they control the presidency, gets to put in its own set of different rules and understandings of the Constitution?

PROFESSOR AMAR: It's a great point that—a question that ramifies in many directions. So one interesting difference between the judiciary and the presidency is the judiciary doesn't turn over all at once and I think—what the presidency does and I think over the long run that has actually often helped the judiciary because new people come on one at a time and they become very much assimilated to expanding judicial power and they don't just automatically or even if they wanted to they aren't able to undo everything immediately. And some presidents may be tempted to try to undo everything that their predecessor did because they come to power on a Steven [inaudible]-like creative destruction wave and that might, in some ways, long-term weaken the presidency as each president is tempted maybe to tear down what his predecessor did, the guy that he in effect beat, either by running against an incumbent and beating him or by running in effect against the incumbent's record.

Barack Obama basically bested George W. Bush and not merely John McCain, he ran in effect against the incumbent's record. So it's a deep point that there might be a temptation on the part of some presidents just to tear down what their predecessors have done. That's less true for the judges because they change more glacially; more like the Senate, for example, with its staggered election system.

My own story about why some things have stuck and others haven't is actually surprisingly naive, when my claim is that certain things that really don't fit the text don't last. Legislative vetoes really are whoppingly unconstitutional and eventually, you know, they have a run but they get struck down. The independent council statute in the end doesn't last precisely because it really doesn't fit the Constitution to have judges appointing prosecutors; in what sense can you be inferior and independent.

One thought is over the long run precisely because there is enough—there are enough people out there in the citizenry and in the different branches who are constitutional textualists, who do sort of have a certain maybe even naive respect for worship of the text, practices that really are very much contrary to the clear meaning of the text have a tougher time of

it, they get re-agitated again and again. Or put differently, you know, a clause can sleep for a long time, but if it's in the Constitution it can plausibly re-awaken, whether it's the Tenth Amendment or the Ninth Amendment or the Second Amendment, for that matter, or even, you know, the privileges or immunities clause I'm still hoping, John [Yoo], that our friend Justice Thomas, you know, keeps pushing that clause, you know, and he has a ground to stand on because that clause really is in the text, you know, in a way that the words substantive due process aren't quite in the text.

So one thing the Washington precedents that survive, many of them survive because they are plausible glosses on the text, so that's one point. And the one that really doesn't, the idea that a president, merely by decree, can create a federal law really is, in my view, very strongly inconsistent with deep structural and textual principles, and that's the one where the Jeffersonians on the court pushed back with *Hudson* and *Goodwin*¹⁰ and that's basically the Jeffersonians on the court saying, this violates our understanding of federal power, and that's partly because they thought that a federal common law of crimes was an outrage when federalists had floated the idea in support of the Federal Sedition Law of 1798, the federalists said, listen, there's a Federal Sedition Law of common law, this statute that we're passing actually softens it, so this is a reform measure.

That whole federalist argument, which the Republicans didn't buy, pivoted on the permissibility of a Federal Sedition Law that was a matter of federal common law. The Republicans didn't buy any of that so *Hudson* and *Goodwin*¹¹ is connected to anti-federalist Jeffersonian ideology, but it taps in, in my view, to a deep understanding of Constitutional structure.

So one point is, Washington's practices survive best because most of them really were plausible interpretations of the Constitution when there was indeterminacy. Second reason they survive is the need for settlement. Sometimes we just need rules, you know, whether we drive on the right side or the left side of the street, we've got to figure it out and it matters more that there be a rule than that it be some perfect rule.

The Constitution, precisely because Article II is so indeterminate on a bunch of things and we need rules on what formally, makes a treaty a treaty, how can negotiations in treaties be conducted, who gets to recognize, indeed recognize. We at least give us a default principle, and so we need some settlement of this; the text doesn't and this glosses the text. Third, these settlements tend to involve inter-branch truces. My point about independent agencies, for example, is presidents have signed off on them. My point about the decision of 1789 is, Congress signed off on the fact that

10. *Hudson*, 11 U.S. 32 (1812).

11. *Id.*

there be unilateral presidential power to dismiss.

So when even the branch that's disadvantaged and sort of agreeing to the thing, this is a kind of acromin-like point about when the three branches might agree. I don't think it's maybe true of all constitutional law, but when the constitutional law is the law of the three branches and when all three branches really do agree on a point, I think it's more likely to say that that's been settled. Presidents never agreed to legislative vetoes, as Steve Calabrese and others have pointed out, and they never really—I mean, lots of presidents have objected to the independent council statute, to 1978 statute, so those things, haven't stuck partly because they're constitutionally preposterous and partly because actually there hasn't been a solid three-branch agreement.

And then finally, as you know, John [Yoo], Thomas Jefferson is against all sorts of executive power until he becomes executive and then he begins to understand, that maybe there's actually a reason why executive power needs to be exercised in all. So he does all sorts of things as president that violate his own earlier constitutional understandings, whether that's acquiring Louisiana or having a sweeping embargo policy, and so, it's actually useful so that basically presence of both parties early on begin to understand the need for executive power. So he talks one game when he's out of power, but he does a different thing when he's president, and once we have the combination—so I think you're right, John [Yoo], also that to the extent I just emphasized Washington and the fact that everyone's agreeing to it at the time, I'm missing one other thing that's an important part of the story, which is Jefferson blesses all of this, and once you have the combination of Washington doing it and Jefferson doing it again, like with the Louisiana Purchase, following the script for the negotiation of the Jay Treaty, then it becomes really settled in a very deep way when presidents of both parties have done it.

MR. NAGORSKI: This question is from the audience, Professor Amar: Should presidential powers increase to accommodate an ever-more-complex world and do modern interpretations of presidential powers take into account the U.S.'s increased size and prosperity, since the original enactment of the Constitution?

PROFESSOR AMAR: That's a great question. Some provisions of the Constitution are pegged to facts about the world in accordion-like fashion. Before I talk about the president, let me just give you an example of the economy. The Interstate Commerce Clause gives Congress authority to regulate certain kinds of transactions that are genuinely interstate and international. I myself think the key test is really, are they interstate and international, rather than, are they narrowly economic, but for present purposes it doesn't really matter whether you agree with me on that or not.

One key trigger, I would say it is the key trigger, but someone else

would say there's also an economic component, but one key trigger is, is something really interstate in nature; if it really is, not in a winking way, but in a real way, Congress has power to regulate it, if it really is interstate or international. And then we have to figure out how strict we're going to be about applying that test.

Now, here's a fact: In 1787 most of the world is not really interstate. Most Americans live and die within a fifty-mile radius, they don't cross state lines, neither do most goods and services that they're producing and consuming. My children believe that they get milk from cartons; you know, 200 years ago people understood that milk came from cows, there was a cow in every neighborhood because there wasn't refrigeration technology. Today there are cows in three states: Wisconsin, Vermont and California and the rest of us get all our milk from those three states.

One silly mistake in one place in Iowa compromises the entire food chain across America when they're contaminated eggs; and eggs, of course, are part of all sorts of foods, so that our world—I'm not just making it up because I believe in Leviathan, it's just the case that today, because of improvements or changes in communications technology and transportation technology and refrigeration technology, a lot more of our world really is interstate and international in a way that it wasn't before. Ninety-five percent of the GDP really is three degrees of Kevin Bacon, you know, it's connected in a way that wasn't at the founding, so I think Congress has more power today on the ground in fact than at the founding for three reasons: One I just gave you, because as a matter of fact there's more interstate stuff and Congress's power—if the facts accordion out, there really is more interesting commerce and Congress's powers peg to that, Congress's power accords out; have there been factual changes. A second reason we have more federal powers, we have a whole series of constitutional amendments that explicitly give Congress more power. The Bill of Rights begins with the words "Congress shall make no law" and ends with the Tenth Amendment that's about states' rights. The Thirteenth Amendment ends with the words "Congress shall have power." The Fourteenth Amendment ends with the words "Congress shall have power." The Fifteenth Amendment ends with the words "Congress shall have power."

After the Civil War, there was power given to the federal government. The Sixteenth Amendment is a huge grant of federal power. The Seventeenth Amendment doesn't formally expand federal power, but it makes senators a lot more willing to impose mandates on states and do other things because they don't have to answer to state legislatures. So the second reason we have a lot more federal power today is that we've had, sort of the second and third reasons, a series of amendments that have expanded federal power and that have made the federal government more

willing to use that power because it's structured differently. So those are three reasons why we really do have legitimately a more powerful federal government today because we have bigger fat, more interstate and international stuff, constitutional amendments and a different structure. Now let's take all that and apply it to the presidency.

When you have wars, you will have more power in the federal government in general and within the federal government more power in the executive, and when America—when you have a closer connection to the rest of the world you will have more power in the federal government because it's tasked with foreign affairs, and within the federal government lots of power, maybe more power than the president because he's the sole organ of communication, he's the one negotiating these treaties, he's the one recognizing and de-recognizing. So in the founder's world when we were separated by vast oceanic moats from the rest of the world, the federal government played less of a role and the president was less powerful and significant.

Today we live in a very small world and a world of permanent war. I have known in my lifetime nothing but war. The wars have been cold and hot, but for the entirety of my life I lived under the cold war and which flared up in all sorts of hot ways in Vietnam and elsewhere. The war on terror so-called will be endless. Before 9/11 the last time foreigners drew blood on American soil in the heartland was the war of 1812, okay, but today we live in a world where that threat is on the president and that, yes, is going to make the federal government stronger in general, and within the federal government the president stronger, so that's just the accordion fact of our world.

Now we've had a series of constitutional amendments that have empowered the federal government more and the president's part of the federal government and the series of constitutional amendments that have strengthened the personal connection between the president and the citizens; an amendment, for example, talking about primary elections, you know, there were no primary elections before 1960. LBJ thinks he can be elected president without entering a single primary, John Kennedy only enters seven primaries in 1960 because those are the only primaries; but today there's a more direct connection between voters and the president than sort of ever before, enabling presidents more than ever before to claim mandates; they sit atop, as I said, a much vaster federal bureaucracy.

So, yes, facts of the world have changed, the constitution's law of federal power has changed and the constitution's structure has changed, making presidents more willing to use power.

MR. NAGORSKI: Thank you, Professor Amar. Another question from the audience: Given the proximity of the ratification of the Constitution to the Revolutionary War, do you think an intent argument could be made that

the founders accounted for extra legal measures afforded to the President?

PROFESSOR AMAR: Extra legal measure—could you read that one again. I thought it was going in a different direction, but maybe I misunderstood.

MR. NAGORSKI: Do you think an intent argument could be made that the founders accounted for extra legal measures afforded to the President?

PROFESSOR AMAR: Extra legal measures, that begins to make me a little nervous, extra legal measures. I'm nervous both by extra legal measures of presidents asserting all sorts of extra legal powers. I'm also made a little nervous by what Sharron Angle calls Second Amendment remedies. If by that she means taking up arms against a duly elected government, I would say, been there, done that, it's called the Civil War. Let's not do that again. I'm with Mr. Lincoln on that.

So those make me—that talk makes me—the Second Amendment does come out of the American Revolution, and in the American Revolution the heroes are militias and George Washington, okay? But you have to remember that those militias are rebelling against governments that no one voted for in America; no one voted for Parliament, no one voted for the king, and it's a very different thing to have extra legal remedies against a duly elected government and that makes me very, very nervous, that idea. So when appealing to 1776, these militias in 1861 take up arms against Lincoln, I think that's totally different because he was duly elected and they've completely misunderstood the proper meaning of the Second Amendment.

And after the Civil War, you see, the Constitution is amended in a way that cuts back on some of these militia ideas and even local jury ideas, creating a much more powerful central government. Who actually supervises the actual ratification of the Fourteenth Amendment; it's the federal army, not local militias.

So if by “extra legal” we mean extra legal resort against the president because you voted against him, that makes me nervous. If “extra legal” means that he can do all sorts of things to save the country, that makes me nervous. Lincoln didn't quite claim that, by the way. I think what Lincoln did was completely legal in almost every respect. Lincoln did say, look, I'm the only officer who's in power 24/7, 365, stuff happens, it often happens when Congress isn't in session, and in order to preserve the ability of Congress even to meet, it may very well be necessary that I unilaterally have to take certain actions precisely to preserve the status quo, to create the conditions under which Congress actually can meet, and once they do meet, so I've taken all sorts of unilateral action, Lincoln says, because I was the only one in town; if I didn't do these things, the capitol would have fallen. I did all these things, I immediately called Congress into special session, at that special session I immediately told them everything that I had done, I

told them further they have to pass laws authorizing *nunc pro tunc*, retroactively blessing what I've done, and if they think I've done anything wrong they should impeach me, and if I hadn't done these things, the Constitution itself might have failed.

We could lose various wars and still be America. Not all wars are existential wars, there are only four wars that I think America has to win: It has to win the Revolutionary War, otherwise there's no Constitution. It has to win the War of 1812, otherwise, again, we're just all under the King again, that's just the Revolutionary War, part two. It has to win the Civil War, because otherwise government of, by, and for the people cannot—it will perish from the earth if people who lost an election fair and square are able to overturn its result by force of arms. I think as a practical matter World War II has to be won, otherwise in the long run America loses if Mussolini and Tojo and Hirohito and Hitler all ally, possibly even with Stalin.

The War on Terror is a little different, they could kill millions of people, these terrorists, but they actually couldn't destroy our own constitutional system. We could tear it down, we could destroy it, if we sort of start to do too many extra legal things in the name of preserving our system. So extra legal makes me nervous.

MR. NAGORSKI: Are there any other questions from the panel at this time? Otherwise I can ask another audience question here. As a lay person, isn't the real issue how these theories of executive power, how they'll result in minimizing illegal and immoral conduct?

PROFESSOR AMAR: Yes, excellent, yes, that's—the system is designed ultimately to secure the blessings of liberty to ourselves and our posterity. And in my view, the federal government is very much a national security system.

Why, after an American revolution that was fought by localists against an imperial center would you ever create such a strong new federal government and a strong new executive, and the answer is ultimately because, as dangerous as that is, King George III, is more dangerous and you need someone to protect you against King George III, and thank God we actually have someone whom we can trust to do that, to protect us against George III, who won't become himself a George III, his name is George Washington, the system is really designed for him, it's a national security office and a national security—ultimately it's not about the economy, the way Charles Beard said it was, “it” being the Constitution.

I think it's ultimately about national security. And so our threats to liberty can come from threats abroad that would conquer America from without, but our threats to liberty can also come from an overly powerful government that does things that it's not supposed to do. And that overly powerful government is, you know, this is just from civics, the idea is to

keep it in check through regular elections and through separation of powers and checks and balances and judicial review and federalism.

So here's one really important check, we have elections every two years, come hell or high water. Britain didn't do that, they didn't have an election at all in Britain between 1935 and 1945, they just canceled all the elections. The incumbents formed a coalition of national unity and just preserved themselves in power. We don't do that, we held an election fair and square, even in the middle—twice in the middle of a great civil war, and the second time—and Lincoln lost badly the first time around and the second time around he thought he was going to lose badly; he ended up not. But that's an important check, so, I don't care how you vote, but I do want all of you to vote. That's one of the biggest checks you have, whether you like what your government has been doing or you don't like what your government has been doing. And two years is a pretty—it just works like clockwork, it's pretty amazing, and in fact every two years the Army gets defunded, under the Constitution every two years there has to be a new bill authorizing funding of the military, that constitutionally lapses, sunsets, which connects to some conversations that you may be having about Congress's power of the purse and foreign affairs more generally. That two years is connected to the two-year electoral cycle, that's basically about—if at any point you guys don't want a war, just say no.

MR. NAGORSKI: Thank you, Professor Amar. I think we have time for one more question. Would one of the panelists like to ask a question to end it?

PROFESSOR ROBERT DELAHUNTY: Let me just ask a question about independent agencies, if I may. The Federal Reserve Board, which you mentioned, Professor Amar, is certainly well-entrenched, but it also, as we know, plays a very powerful policy role. Some people who believe in the unconstitutionality of independent agencies, including that one, would argue that—

PROFESSOR AMAR: Which one?

PROFESSOR DELAHUNTY: The Federal Reserve Board. Yes. Would argue that its power is so extensive that it could really thwart the president in a material way from carrying out the policies that he's announced to the nation and was elected to execute. I mean, if we have a president who wants a stimulus plan, but a Federal Reserve Board that is intent on controlling inflation and keeping interest rates high, it frustrates the executive will and probably also the legislative will. Is that an obstacle to the constitutionality of an independent agency like the Federal Reserve Board or not, do you think?

PROFESSOR AMAR: I think that's an outstanding question and so if I were just looking at the text and structure in a vacuum, that might have been my inclination. Now, here's in the end why that's not what I said:

Because it's not our practice and it hasn't been our practice for at least seventy-five years, as to the Fed itself, because I know of no president, Republican or Democrat, liberal or conservative, who's made the argument that you just made in opposition to the Fed and so it does move me, but many academics have, and I'm not unsympathetic to the theoretical argument, but no president—and if I'm wrong on that fact, then I would need to rethink my theory—

PROFESSOR DELAHUNTY: We thought about it in Bush I, but it came to nothing.

PROFESSOR AMAR: So third, because one could argue that precursors of this exist as early as the first bank and so it's not just even the last years, depending on how much you buy Professor Mashaw's idea, either the first patent office was an independent agency or these early commissions to oversee the Mint, that was an independent agency, or the Bank of the United States or something, so arguably it goes back even further and definitely attorneys general, as early as William Wirt, are backing away from the strongest aversion of the unitary executive theory.

Even Roger Taney won't fully back Andy Jackson on the most robust vision of the theory. I did sneak in yet an additional new argument, because I am actually worried about this, you know, because truthfully, functionally I'm not completely clear on why the treasury is so different from the Fed when I look at what they actually do, and so I fell back on this sort of form list, well, a single-headed agency versus a hydra-head, but when I actually look at what they do, they have all sorts of committees together so we—you make a very good point. I hear you.

One other thing that I did try to slip in is, there is one part of the Constitution recently that can be understood to bless the constitutionality of independent agencies. So even if the—it's a bad idea, if it's in the Constitution, well, it's in the Constitution, and believe it or not, it's in the 25th Amendment, and the 25th Amendment, actually, sharply distinguishes between cabinet officers and sort of other offices.

Let me see if I can find that little 25th Amendment discussion here, because arguably the 25th Amendment provides modern blessing, reinforcement of the idea of independent agencies. Let me see if I can find it, and if not, I'll just have to actually read from the text of the Constitution itself, God forbid. Yes, so let me just read it for what it's worth. One additional element of coherence and reinforcement may be found in Section IV of the 25th Amendment, which was ratified in 1967, well after the high-profile emergence of independent agencies. Section IV singles out, "the principal officers of the executive departments," for special responsibilities. Unless statutes specify otherwise, these officers and only these officers decide in the first instance whether a president is so disabled as to warrant his displacement by a vice president.

True, Section IV does not speak directly to the issue of whether a president may unilaterally oust all high-level executive branch officials, but it does address a similar, indeed a symmetric question, whether high-level executive branch officials may ever oust the president, and the officials who are specified by Section IV to make this ouster decision are “principals, officers of the executive departments,” cabinet heads in evident contradistinction to the board members or commissioners of independent agencies. According to the relevant congressional report “only officials of cabinet rank should participate in the decision as to whether a presidential inability exists. The intent is that the presidential appointees who direct the ten executive departments named in 5 U.S.C. Section I, or any executive department established in the future generally considered to comprise the president’s cabinet would participate to determine inability.”¹²

Because presidents are responsible for monitoring cabinet officers, monitoring that includes the power of at-will removal, these cabinet officers are symmetrically best positioned to monitor the president for signs of disability. Independent agency officials are not in the same position to personally and closely monitor the president, precisely because they are not as a rule personally and closely monitored by the president himself or removable at-will by the president, for that matter. In large part, the commissioners of independent agencies monitor and are monitored by each other, rather than monitoring and being monitored by the president in cabinet-style fashion. Thus, even if the basic distinction between cabinet department and independent agencies was not clearly established in the constitutional text prior to 1967, the 25th Amendment can be read as a constitutional codification of this basic distinction and an implicit enforcement of the constitutionality of independent agencies. Now, ladies and gentlemen, you know, you can buy that one if not, but that’s actually a genuinely new idea, that’s a new contribution to the literature. It’s sort of in my trademark a clever little textual point that everyone else has overlooked, but I’m doing that cleverness ultimately honestly in the service of not having to declare a vast amount of modern practice unconstitutional, because I do find that kind of destabilizing.

12. H.R.Rep. No. 203, 89th Cong., 1st Sess., 3 (1965).